

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

YOO JIN CHONG and MARIBETH
CHONG,

Plaintiffs,

v.

SAFECO INSURANCE COMPANY OF
AMERICA,

Defendant.

CASE NO. C05-0974RSM

ORDER DENYING PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT AND DENYING IN
PART DEFENDANT'S CROSS-
MOTION FOR SUMMARY
JUDGMENT

I. INTRODUCTION

This matter comes before the Court on plaintiffs' Motion for Partial Summary Judgment and defendant's related Cross-Motion for Partial Summary Judgment. (Dkts. #17 and #39). Plaintiffs ask this Court to dismiss defendant's one-year contractual limitation affirmative defense to their breach of contract claim based on the doctrines of express waiver, implied waiver or equitable estoppel. Defendant argues that it did not expressly waive the one-year limitation period, that any waiver must be in writing, that there was no implied waiver because it reaffirmed in writing that its continued investigation did not constitute waiver, and that Washington law provides that continued investigations do not constitute waiver. Defendant

1 further argues that plaintiffs cannot rely on the doctrine of equitable estoppel because they come
2 to this Court with “unclean hands.” Accordingly, defendant asks this Court to grant summary
3 judgment in its favor, and dismiss plaintiffs’ breach of contract claims.

4 For the reasons set forth below, the Court disagrees with both plaintiffs and defendant,
5 and therefore DENIES plaintiffs’ motion for partial summary judgment, and DENIES IN PART
6 defendant’s cross-motion for partial summary judgment.

7 II. DISCUSSION.

8 **A. Background**

9 This matter arises from the denial of an insurance claim for damage to plaintiffs’ house
10 and belongings resulting from a fire over the Fourth of July weekend in 2002. Plaintiffs
11 submitted a claim under their policy with defendant. The insurance policy contains a clause
12 related to the filing of any lawsuit against defendant. That clause states:

13 **8. Suit Against Us.** No action shall be brought unless there has been
14 compliance with the policy provisions and the action is started within one year
after the loss or damage.

15 (Dkt. #19, Ex. 1 at 11) (emphasis in original).

16 While defendant paid nearly \$700,000 on the claim, on October 2, 2004, defendant
17 denied any remaining coverage on the basis that plaintiffs had intentionally misrepresented
18 information with respect to their financial situation, the repair estimate and the contents
19 inventory. (Dkt. #43, Ex. T at 4). Defendant also informed plaintiffs that additional policy
20 defenses and limitations on recovery may apply to their claim, including the “Suit Against Us”
21 provision highlighted above. (Dkt. #43, Ex. T at 5).

22 On May 27, 2005, plaintiffs filed the instant lawsuit alleging breach of contract claims,
23 violation of the Washington Consumer Protection Act (“CPA”) and bad faith claims. In its
24 Answer to the Complaint, defendant asserted as an affirmative defense that “[p]laintiffs have
25 failed to file suit within the applicable limitations [period].” (Dkt. #4 at 4). Defendant agrees
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1 that the limitation period applies only to plaintiffs' breach of contract claims, but not to the CPA
2 or bad faith claims.

3 Plaintiffs now argue that this Court should dismiss defendant's affirmative defense
4 because defendant's counsel expressly waived that limitation on June 6, 2003, at the oral
5 examination of Maribeth Chong. Ms. Chong¹ recalls that prior to her examination, her former
6 counsel asked defendant's counsel whether he would waive the one-year contractual limitation
7 period to avoid the necessity of filing suit before defendant had the opportunity to complete its
8 investigation. Ms. Chong asserts that defendant's counsel replied, "of course."² (Dkt. #18 at 1-
9 2). Plaintiff further argues that even if there had been no express oral waiver, the numerous
10 letters of correspondence received from defendant, wherein defendant stated it was continuing
11 to investigate plaintiffs' claim, constitute implied waiver of the limitation period. Finally,
12 plaintiffs assert that defendant should be prevented from raising the contractual limitation
13 defense based on the doctrine of equitable estoppel.

14 Defendant asserts that no express waiver was ever made on June 6, 2003, that plaintiffs
15 were informed through a number of letters that no waiver or estoppel was intended and should
16 not be inferred from its continued investigation of plaintiffs' claim, and that plaintiffs cannot rely
17 on the doctrine of equitable estoppel because they come to this Court with "unclean hands."
18 Defendant asks this Court to apply the limitation period and dismiss plaintiffs' breach of contract
19 claims.

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22 ¹ The Court recognizes that both Maribeth and Yoojin Chong are doctors. However, in order to
23 avoid confusion, the Court will differentiate plaintiffs by referring to them as either Ms. Chong or Mr.
24 Chong.

25 ² Plaintiffs have since conceded that there is a genuine issue of material fact with respect to this
26 recollection, and therefore, proceed only on their alternate arguments based on implied waiver and
equitable estoppel. (Dkt. #52 at 3). As further discussed below, defendant continues to argue that Ms.
Chong's declaration raises no genuine issue of material fact. (Dkt. #53 at 2).

B. Summary Judgment Standard

Summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The Court must draw all reasonable inferences in favor of the non-moving party. *See F.D.I.C. v. O’Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev’d on other grounds*, 512 U.S. 79 (1994). The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. *See Anderson*, 477 U.S. at 257. Mere disagreement, or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment. *See California Architectural Bldg. Prods., Inc., v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

Genuine factual issues are those for which the evidence is such that “a reasonable jury could return a verdict for the non-moving party.” *Anderson*, 477 U.S. at 248. Material facts are those which might affect the outcome of the suit under governing law. *See id.* In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *O’Melveny & Meyers*, 969 F.2d at 747). Furthermore, conclusory or speculative testimony is insufficient to raise a genuine issue of fact to defeat summary judgment. *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 60 F. 3d 337, 345 (9th Cir. 1995). Similarly, hearsay evidence may not be considered in deciding whether material facts are at issue in summary judgment motions. *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F. 2d 665, 667 (9th Cir. 1980).

C. Applicable Law

The instant case was filed in this Court based on diversity of the parties. Accordingly,

1 the issues presented are governed by Washington State law. *See Klaxon Co. v. Stentor Electric*
2 *Mfg. Co.*, 313 U.S. 487, 496 (1941); *Insurance Co. N. Am. v. Federal Express Corp.*, 189 F.3d
3 914, 919 (9th Cir. 1999) (explaining that in an ordinary diversity case, federal courts apply the
4 substantive law of the forum in which the court is located). Neither party disputes that
5 Washington State law is applicable to this case.

6 **D. Waiver of Contractual Limitation Period**

7 As noted above, the insurance policy at issue in this dispute contains a clause related to
8 the filing of any lawsuit against defendant. That clause states:

9 **8. Suit Against Us.** No action shall be brought unless there has been
10 compliance with the policy provisions and the action is started within one year
after the loss or damage.

11 (Dkt. #19, Ex. 1 at 11) (emphasis in original). While plaintiffs filed their claim for damages on
12 or about July 4, 2002, they did not file the instant lawsuit until May 27, 2005. It appears to be
13 defendant's position that the suit limitation period ran on July 4, 2003. (*See* Dkt. #19, Ex. 4).
14 Plaintiffs do not dispute that contractual suit limitation periods in insurance policies are valid and
15 enforceable under Washington law. *See* RCW § 48.18.200 (stating that "[n]o insurance contract
16 . . . shall contain any condition, stipulation, or agreement . . . limiting right of action against the
17 insurer . . . to a period of less than one year from the date of the loss."); *see also Johnson v.*
18 *Phoenix Assurance Co.*, 70 Wn.2d 726, 728-29 (1967) (upholding a policy provision requiring
19 suit within 12 months). Rather, plaintiffs argue that defendant waived the limitation period, or in
20 the alternative, should be estopped from asserting the limitation period. The Court addresses
21 each argument in turn below.

22 *I. Waiver*

23 A waiver is the voluntary relinquishment of a known right. *Voelker v. Joseph*, 62 Wn.2d
24 429, 336 (1963). "To establish it, there must be shown an act or omission on the part of the one
25 charged with the waiver fairly evidencing an intention permanently to surrender the right in
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1 question.” *Id.* (citation omitted). Washington courts have determined that waiver may be
2 express or implied. *Reynolds Metals Company v. Electric Smith Construction & Equipment*
3 *Co.*, 4 Wn. App. 695, 700 (1971) (citation omitted). However, if a party asserts that waiver
4 was implied, “caution must be exercised both in proof and application.” *Id.* In addition, the
5 facts and circumstances relied upon must be unequivocal in character. *Id.* (citation omitted).
6 When waiver would be in derogation of a statutory right, it is not favored, and will not be
7 inferred from doubtful acts. *Id.* (citations omitted).

8 a. Express Waiver

9 Plaintiffs initially argued that defendant’s counsel expressly waived the policy’s limitation
10 period on June 6, 2003, when defendant’s counsel responded “of course,” when asked by
11 plaintiffs’ counsel if he would waive that provision. That argument is supported by the
12 declaration of Ms. Chong. (Dkt. #18 at 1-2). However, plaintiffs now concede that defendant’s
13 response raises a genuine issue of material fact as to that conversation. Defendant has produced
14 the declaration of Susan Paulson, an adjuster who was present at the examination, who denies
15 that such a conversation ever occurred. (Dkt. #40 at 1). Defendant has also produced the
16 deposition of Mr. Chong, who was present at the examination, but does not recall hearing the
17 conversation between Ms. Chong and her counsel. (Dkt. #53, Ex. A).

18 Defendant argues that Ms. Chong’s declaration does not create an issue of material fact
19 as to whether defendant’s counsel expressly waived the limitation period, because any agreement
20 in conflict with the plain language of the policy must be in writing.³ (Dkt. #39 at 11-12).

21 The Court finds defendant’s argument misplaced. On defendant’s cross-motion for
22 summary judgment, Ms. Chong’s declaration does create a genuine issue of material fact as to
23 whether defendant’s counsel expressly waived the limitation period. Therefore, the Court agrees
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25 ³ Defendant also makes one conclusory statement that Ms. Chong’s declaration “may very well
26 violate Federal Rule of Civil Procedure 56(g). (Dkt. #39 at 11). Because defendant presents no
additional argument or legal authority in support of that statement, the Court will disregard it.

1 with plaintiff that this issue is left for the jury to resolve. Accordingly, the Court need not
2 consider whether any oral waiver could properly modify the terms of the insurance policy.

3 b. Implied Waiver

4 Plaintiffs next argue that even if there is no express waiver, defendant impliedly waived
5 the limitation period by repeatedly advising them that its investigation was continuing and
6 therefore it could neither admit nor deny liability. (Dkt. #17 at 11-12). Defendant responds that
7 RCW 48.18.470 precludes the finding of implied waiver. (Dkt. #53 at 3). The Court agrees
8 with defendant.

9 Although plaintiffs present numerous letters from defendant in support of their argument,
10 wherein defendant states that it is continuing to investigate plaintiffs' claim, those same letters
11 also include explicit language that defendant "reserves all of its rights and defenses, and no
12 waiver nor estoppel is intended nor should it be inferred." (Dkt. #18, Exs. 1-3, 5-6, 9-11, 13-
13 16, 18-19 and 21-26). Defendant's language is directly supported by Washington statute which
14 provides that "[n]one of the following acts by or on behalf of an insurer shall be deemed to
15 constitute a waiver of any provision of a policy or of any defense of the insurer thereunder: . .
16 .(c) Investigating any loss or claim under any policy or engaging in negotiations looking toward
17 a possible settlement of any such loss or claim." RCW 48.18.470 (c). Furthermore, while
18 Washington courts do not appear to have specifically addressed this issue, they have rejected
19 implied waiver by implication. *See, e.g., Logan v. The North-West Ins. Co.*, 45 Wn. App. 95, 99
20 (1986) (explaining that waiver is "the voluntary and intentional relinquishment or abandonment
21 of a known right, with the insurer's full knowledge of all the facts pertaining thereto," and
22 therefore, to avoid summary judgment, plaintiffs must submit evidence that defendant
23 "voluntarily and intentionally waived its right to assert the 1-year policy limitation"(citation
24 omitted)). Thus, this Court finds that it is precluded from equating defendant's continued
25 investigation, with the voluntary relinquishment, or waiver, of the contractual suit limitation
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1 period. Accordingly, to the extent that defendant asks the Court to grant summary judgment in
2 its favor by rejecting plaintiff's implied waiver argument, the Court will so Order.

3 2. Estoppel

4 Plaintiffs next argue that defendant should be prevented from raising an affirmative
5 defense based on the contractual limitation period under the equitable estoppel doctrine. (Dkt.
6 #17 at 12-19). Defendant does not respond to the merits of plaintiffs' estoppel argument.
7 Rather, defendant argues that plaintiffs are not entitled to rely on an equitable estoppel defense
8 because they come to this Court with "unclean hands." (Dkt. #39 at 16-17). As further
9 explained below, the Court is not persuaded by defendant that plaintiffs are precluded from
10 relying on equitable estoppel; however, the Court also finds that genuine issues of material fact
11 have been raised, and therefore summary judgment is not appropriate for either party.

12 Washington courts have consistently held that, in cases involving contractual rather than
13 statutory limitation periods, a party may be equitably estopped from asserting a suit limitation
14 provision "where a person, by his acts or representations, causes another to change his position
15 to or refrain from performing a necessary act to such person's detriment or prejudice." *Dickson*
16 *v. United States Fidelity & Guaranty Co.*, 77 Wn.2d 785, 788 (1970); *Buchanan v. Switz. Gem.*
17 *Ins. Co.*, 76 Wn.2d 100, 108 (1969) (explaining that in the insurance context, estoppel precludes
18 an insurer from asserting a right where it would be inequitable to permit the assertion). In
19 general, the estoppel analysis involves issues of fact. *Litz v. Pierce County*, 44 Wn. App. 674,
20 683 (1986). In addition, the assertion of estoppel does not require the proponent to show that
21 the insurer intentionally, voluntarily, or purposely relinquished the right or privilege. *Buchanan*,
22 76 Wn.2d at 108.

23 While the Court does not agree with defendant that, even when viewing the facts in the
24 light most favorable to defendant, plaintiffs have come to this Court with unclean hands, the
25 Court is satisfied that there is a material issue of fact as to whether defendant's continued
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1 assurances that it was investigating plaintiffs' claim caused plaintiffs to refrain from initiating suit
2 to their detriment. Here, just as in *Dickson*, defendant's investigation continued well beyond the
3 one-year contractual limitation period. Likewise, plaintiffs were not informed that a final
4 decision was reached, and their claim was being denied, until after that limitation period had run.
5 The Court finds that such conduct presents a triable issue as to whether it "logically excuse[s]
6 plaintiffs from complying with the terms of the policy." *Dickson*, 77 Wn.2d at 788.

7 Furthermore, plaintiffs arguably received mixed signals from defendant. In almost every
8 letter on this record written from defendant to plaintiffs, defendant included a paragraph that
9 advised plaintiffs it was continuing its investigation of the claim, and therefore, it could neither
10 admit nor deny liability. (See Dkts. #18, Exs. 1-3, 5-6, 9-11, 13-16, 18-19 and 21-26 and #43,
11 Exs. I-N). But those same letters also included the paragraph that defendant required
12 compliance with its policy and reserved its rights and defenses. (See Dkts. #18, Exs. 1-3, 5-6, 9-
13 11, 13-16, 18-19 and 21-26 and #43, Exs. I-N). Interestingly, many of these letters were sent to
14 plaintiffs after the one-year limitation period had run. Thus, the Court finds that plaintiffs were
15 justified in believing that defendant would continue to investigate their claim, and continue to
16 work towards settlement, without requiring them to file suit. See *David v. Oakland Home Ins.*
17 *Co.*, 11 Wn. 181, 185 (1895).

18 Finally, the Court is not persuaded that the estoppel disclaimer and waiver notice
19 precludes plaintiffs' reliance on equitable estoppel. Although the Court has determined that
20 RCW 48.18.470 precludes implied waiver of the one-year contractual limitation period,
21 defendant has not presented, and the Court is not aware of, any authority as to what preclusive
22 effect, if any, the estoppel disclaimer contained in defendant's letter has on plaintiffs' claims.
23 See 44A Am. Jur. 2nd Insurance § 1577 (2003) (explaining that nonwaiver notices or estoppel
24 disclaimers in a policy "do not supersede the recognized principles of the law of waiver and
25 estoppel and are not so conclusive as to prevent the officers and agents of the insurer through
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1 whom it must act in the transaction of business and the conduct of its affairs from binding the
2 insurer by a waiver of a condition or from creating an estoppel against it to assert a breach of
3 condition in avoidance of the policy”).

4 For all of these reasons, the Court finds that there are genuine issues of material fact
5 concerning the applicability of estoppel to the one-year contractual limitation period. Therefore,
6 summary judgment is not appropriate for either party.

7 **E. Defendant’s Request for Rule 56(f) Continuance**

8 The Court acknowledges defendant’s request for a Rule 56(f) continuance to the extent
9 that this Court requests additional information regarding plaintiff’s lack of good faith in
10 requesting equitable relief, or to the extent that the Court requests a declaration from Mr. Bob
11 Mills, the subsequent purchaser of plaintiffs’ house. (Dkt. #39 at 3 n. 1 and 17 n. 2). However,
12 because the Court finds that summary judgment is not appropriate for other reasons, the Court
13 declines to request any further information from defendant, and declines to grant a Rule 56(f)
14 continuance.

15 **F. Plaintiffs’ Remaining Bad Faith and Consumer Protection Act Claims**

16 The parties agree that the limitation period applies only to plaintiffs’ breach of contract
17 claims, but not to plaintiffs’ CPA or bad faith claims. Accordingly, those claims are not
18 implicated by this Order and remain pending.

19 **III. CONCLUSION**

20 Having reviewed plaintiffs’ motion for partial summary judgment (Dkt. #17), defendant’s
21 opposition and cross-motion for partial summary judgment (Dkt. #39), plaintiffs’ reply in
22 support of their motion and opposition to defendant’s cross-motion (Dkts. #45 and #52),
23 defendant’s reply in support of its cross-motion (Dkt. #53), the declarations and evidence in
24 support of those briefs, and the remainder of the record, the Court hereby ORDERS:

25 (1) Plaintiffs’ Motion for Partial Summary Judgment (Dkt. #17) is DENIED.
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1 (2) Defendant's Cross-Motion for Partial Summary Judgment (Dkt. #39) is GRANTED
2 IN PART and DENIED IN PART as follows:

3 a. To the extent that defendant's cross-motion asks for summary judgment on the issue
4 of implied waiver, that cross-motion is GRANTED. The Court finds that implied waiver is
5 precluded by RCW 48.18.470.

6 b. For the reasons set forth above, the remainder of defendant's cross-motion is
7 DENIED.

8 (3) Plaintiffs' pending CPA and bad faith claims remain to be resolved.

9 (4) The Clerk shall forward a copy of this Order to all counsel of record.

10 DATED this 27th day of April, 2006.

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12 RICARDO S. MARTINEZ
13 UNITED STATES DISTRICT JUDGE
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